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No. 90-484

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

BILL TABER
D/B/A TABER'S GRASS FARM..... *Petitioner*

vs.

JAMES C. PLEDGER, DIRECTOR
ARKANSAS DEPARTMENT OF
FINANCE AND ADMINISTRATION..... *Respondent*

**RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS**

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QUESTION PRESENTED

DOES THE DUE PROCESS CLAUSE OF THE U.S. CONSTITUTION REQUIRE A STATE TO AFFORD A TAXPAYER CONTESTING A TAX ASSESSMENT THE RIGHT TO A POST-DEPRIVATION HEARING IN ADDITION TO A PRE-DEPRIVATION HEARING?

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SUMMARY OF THE ARGUMENT

The basic tenet of the constitutional guarantee to due process is that a person must be afforded an opportunity for a meaningful hearing. The Arkansas Tax Procedure Act protects a taxpayer's right to due process by affording him the opportunity to challenge a tax assessment in an Administrative Law Court prior to paying any of the tax, penalty or interest assessed. Petitioner took full advantage of this opportunity and with counsel presented his case to the Administrative Law Judge, but failed to carry the burden of establishing his entitlement to the claimed exemption.

Only after Respondent filed a tax lien against Petitioner and the Sheriff proceeded to execute upon Petitioner's property did Petitioner seek to appeal the administrative

decision to the Chancery Court of Pulaski County, Arkansas.

To appeal from an adverse administrative decision, within thirty (30) days of the issuance of the resulting notice and demand for payment of the tax deficiency established by the Administrative Law Judge, the taxpayer must either pay the full amount of the assessment, or file with the Director a bond in double the amount of the tax due. Petitioner paid nothing within the thirty-day time limit.

The Supreme Court of Arkansas affirmed the trial court's decision to dismiss the case for lack of subject matter jurisdiction. Petitioner alleges that this decision by the Arkansas Court is in conflict with decisions of this Court, which have held that a post-deprivation hearing is required. Respondent submits that this Court's decisions which have required a post-deprivation hearing involved cases in which the taxpayer was not afforded a pre-deprivation hearing. In the case at bar, taxpayer did in fact have a trial on the merits with the assistance of counsel before an Administrative Law Judge. Accordingly, the Arkansas Supreme Court held that the Arkansas Tax Procedure Act provided sufficient procedural safeguards to satisfy the commands of the Due Process Clause. This decision does not conflict with any decision of another state court of last resort or any federal court decision. Nor does it conflict with any decisions of this Court.

REASONS FOR DENYING THE WRIT

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT REQUIRE A STATE TO AFFORD A TAXPAYER BOTH A PRE-DEPRIVATION HEARING AND A POST-DEPRIVATION HEARING TO CONTEST THE VALIDITY OF A TAX ASSESSMENT.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution does not guarantee a post-deprivation hearing to a taxpayer contesting a tax assessment. The due process clause does guarantee a taxpayer the opportunity to be heard "at a meaningful time and in a meaningful manner." *Matthews v. Eldridge*, 424 U.S. 319, 333, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976); *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L.Ed.2d 62, 85 S.Ct. 1187 (1965). In *Matthews* this Court explained that the due process requirements are directly related to the demands of the particular situation. *Matthews*, 424 U.S. at 335.

This Court has never held that the Due Process Clause requires that a taxpayer be afforded both a pre-deprivation hearing and a post-deprivation hearing to contest a tax assessment. Only recently this Court declared that it is the State's decision whether to provide a pre-deprivation process or a post-deprivation process for allowing a taxpayer to challenge a tax assessment. *McKesson v. Division of Alcoholic Beverages and Tobacco*, 495 U.S. —, 110 L.Ed.2d 17, 110 S.Ct. 2238 (1990).

Arkansas has chosen to allow taxpayers to challenge a tax assessment in a pre-deprivation process. The Arkansas Tax Procedure Act provides a taxpayer the opportunity to present his case challenging the proposed assessment of tax at a

hearing before an Administrative Law Judge. Ark. Code Ann. §26-18-404 (1987), Appendix A, *infra*, 1a. Evidence and testimony are presented by both sides at this hearing, the same as it would be at any other trial. After the hearing, the Administrative Law Judge renders his decision in writing with findings of fact and conclusions of law based upon the evidence presented at trial. Ark. Code Ann. §26-18-405 (1987), Pet. Appendix C, 13a. A taxpayer may appeal an adverse administrative decision to the Chancery Court if, within thirty days of the issuance of the notice and demand for payment of the tax deficiency established by the administrative decision, he either pays under protest the full amount of the assessment determined by the Administrative Law Judge to be due, or files a bond in double the amount of the tax due. Ark. Code Ann. §26-18-406 (1987), Pet. Appendix C, 14a.

Petitioner timely protested the proposed assessment and requested a trial before an Administrative Law Judge. With the assistance of counsel, Petitioner vigorously contested the proposed assessment, arguing that he was entitled to a statutory exemption from sales tax. In April of 1988 the administrative decision was rendered upholding the proposed assessment in its entirety.

On August 23, 1988, a Notice of Final Assessment and Demand for Payment was mailed to the Petitioner. Petitioner failed to perfect an appeal of the administrative decision to the Chancery Court within thirty days of the issuance of the Notice and Demand for Payment.

Only after Respondent filed a Certificate of Indebtedness (tax lien) against Petitioner and the Pulaski County Sheriff served the Petitioner with a Writ of Execution did Petitioner make any attempt to pay any portion of the outstanding tax

liability. On February 13, 1990, the week before the scheduled Sheriff's sale, Petitioner paid "Under Protest" a total of \$360.00, less than two percent (2%) of the assessment, to the Respondent and filed suit in the Pulaski County Chancery Court seeking review of the administrative decision. Subsequently, the Petitioner made two additional payments to the Respondent and amended his complaint to include a request for a refund of those payments as well.

The payments made by Petitioner were not only too little, but were also too late. Citing *Dodge v. Osborn*, 240 U.S. 118, 36 S.Ct. 275 (1916), Petitioner acknowledged that the Respondent has a right to seek the payment of a disputed tax assessment before the taxpayer has a right to seek a judicial review of the merits of such assessment. Pet. Brief pg. 15. Also, this Court has acknowledged that a limit may be placed upon the time within which a taxpayer must perfect an appeal of a contested assessment, stating that if the taxpayer "permits his time for filing such an appeal to expire, he can hardly complain that he has been unjustly treated, for he is in precisely the same position as any other person who is barred by a statute of limitations." *Flora v. United States*, 362 U.S. 145, 175, 80 S.Ct. 630 (1960). Both *Dodge* and *Flora* support the Arkansas Supreme Court's decision to affirm the trial court's dismissal of Petitioner's Complaint. However, Respondent submits that since Petitioner's payments were not made within the statutory time for perfecting an appeal, the amount of the payments was irrelevant and Petitioner's "divisible tax" argument was moot.

Subsequent to filing the petition for a Writ of Certiorari, Petitioner's counsel served both this Court and Respondent's counsel with a copy of a very recent decision by the Supreme Court of Iowa, *Schroeder Oil Co. v. Iowa State Department of*

Revenue and Finance, 458 N.W.2d 602 (July 18, 1990), noting that he plans to discuss this case in his Reply Brief. Petitioner asserts that this case supports his contention that he is entitled to a post-deprivation hearing. Respondent submits that the Iowa tax procedure for contesting a tax assessment is so fundamentally different from the Arkansas Tax Procedure Act that no correlation can be drawn between the *Schroeder* case and the case at bar.

The Iowa tax procedure denies a taxpayer the right to a hearing unless he has paid the full amount of the assessment prior to commencement of the case. *Schroeder Oil Co. v. Iowa State Department of Revenue and Finance*, 458 N.W.2d 602, 603 (1990). However, the Arkansas Tax Procedure Act freely allows a taxpayer to request a hearing without paying any of the tax assessed. Unlike the Iowa tax procedure, the Arkansas Tax Procedure Act affords all taxpayers the right to a trial on the merits.

Referring to the taxpayer's right to contest an assessment, the Supreme Court of Iowa stated, "such a right cannot be confined to the affluent taxpayers or to those who can raise bonds in the amount of the dispute." *Id.* at 604. The Supreme Court of Iowa held that the taxpayer's constitutional right to due process was violated since he was afforded neither a pre-deprivation nor a post-deprivation hearing. The Arkansas Tax Procedure Act avoids the *Schroeder* constitutional problem by providing a taxpayer with the opportunity for a pre-deprivation hearing.

Petitioner argues that the Due Process Clause entitles him to a post-deprivation hearing, regardless of the fact that the Arkansas Tax Procedure Act afforded him a pre-deprivation hearing. Petitioner claims that the Due Process Clause

requires a post-deprivation hearing in all cases. However, this Court has never adopted such a rigid interpretation of the Due Process Clause. As this Court has stated, "Due Process is flexible and calls for such procedural protections as the particular situation demands." *Matthews*, 424 U.S. at 334, [quoting from *Morrissey v. Brewer*, 408 U.S. 471, 481, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972)].

Petitioner requests that his case be viewed solely from the post-deprivation procedural standpoint, and that all of the pre-deprivation procedural safeguards afforded to him be ignored. This Court should not adopt such an isolated and restrictive approach for due process analysis.

To take such a narrow view of the Arkansas Tax Procedure Act would, in effect, deny the existence of the provision that affords a taxpayer the right to a pre-deprivation hearing. Respondent submits that this provision of the Arkansas Tax Procedure Act cannot be ignored, for it is this very provision which satisfies the commands of the Due Process Clause by affording a taxpayer the right to a pre-deprivational trial on the merits. Ark. Code Ann. §26-18-404 (1987), App. A, 1a. In *McKesson*, this Court noted, "The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivations sufficient by itself to satisfy the Due Process Clause. . . ." *McKesson*, 110 L.Ed.2d at 37 fn. 21.

In 1986, the Eighth Circuit Court of Appeals reviewed the Arkansas Tax Procedure Act and found that it does not violate a taxpayer's right to due process. *Ross v. Martin*, 800 Fed. 2d 898 (8th Cir. 1986). The Arkansas Supreme Court's decision in this case is in accordance with that decision as well as the decisions of this Court. There are no decisions by any

state's court of last resort or any Federal Court which contradict the Arkansas Supreme Court's decision in this case.

CONCLUSION

For the above stated reasons, this Court should deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX



Arkansas Code Annotated §26-18-404 (1987). Taxpayer relief.

(a) Any taxpayer who wishes to seek relief from any proposed assessment of taxes by the director shall follow the procedure provided by this section.

(b)(1) A taxpayer may at his option either request the director to consider his request for relief solely upon written documents furnished by the taxpayer or upon the written documents and any evidence produced by the taxpayer at a hearing.

(2) A taxpayer who requests the director to render his decision based on written documents is not entitled by law to any other administrative hearing prior to the director's rendering of his decision and, if necessary, the issuing of a final assessment and demand for payment or issuing of a certificate of indebtedness.

(c) Within thirty (30) days after the service of notice of the proposed assessment or action, the taxpayer may file with the director a written protest under oath, signed by himself or his authorized agent, setting forth the taxpayer's reasons for opposing the proposed assessment.

(d) The director may, in his discretion, extend the time for filing a protest for any period of time not to exceed an additional ninety-day period.

CERTIFICATE OF SERVICE

I, Malcolm P. Bobo, do hereby certify that I have served true and correct copies of the above and foregoing Brief as provided by Supreme Court Rules 29.3 and 29.5(b) to each of the following, by U.S. Mail, postage prepaid, addressed as follows:

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